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In this day of extensive corporate enterprise, one of the schemes often resorted to by promotors to induce the unwary to subscribe for stock in a proposed corporation is offering to issue to them full-paid stock for a small per cent. of its face value, and agreeing further in behalf of the corporation that no more than that per cent. will ever be called for by the corporation. While such agreement is good against the corporation, it is not good against creditors of the corporation who have extended credit to it on the faith that its corporate stock is payable in full, and without notice of a different agreement between the corporation and its stockholders, the unpaid subscriptions being assets for the payment of such creditors on the insolvency of the corporation. This question arose and was so decided in the case of Bent v. Underdown (Ind.), 60 N. E. Rep. 307, where the court gives this excellent statement of the rule:

"An agreement between a corporation and its stockholders that only a certain per cent. of the stock subscribed by each stockholder shall be paid in is binding on the corporation, and the corporation can collect the per cent. specified and no more. But if such corporation becomes insolvent, such unpaid stock subscriptions are subject to be made assets for the benefit of all creditors who gave credit to the corporation on the faith of its capital stock being paid in full, without any knowledge of such agreement."

Gourick's Digest makes a very excellent and pithy comment on the recent decision of the United States Supreme Court in the Insular Tariff Cases, in which it was held that the constitution did not follow the flag into the territories of the United States, unless congress so decreed by proper action. The criticism referred to is as follows: "Whether wittingly or unwittingly done, it is obvious that in holding that the constitution does not follow the flag the supreme court relieved the legislative and executive branches of the government of some problems that would have been vexatious and troublesome for them to handle, but in spirit of 'let the future take care of itself' that seems to have possession of the country, the criticisms that are heard in every direction show that our proverbial insistence upon fair play and the golden rule is still strong and vigorous if not paramount to the selfishness of the age. The majority of the court may be right in holding that the constitution does not follow the flag until congress sends it after it, but it is hard to believe that the framers of the constitution had any thought of controlling or regulating its blessings for mankind by the whims and political intrigues of congress, even if capable of creating the anomaly of a congress controlled by the constitution controlling the constitution." In our editorial of June 21, 1901, 52 Cent. L. J. 477, we endeavored to show that in the light of plain wording of the constitution and its subsequent interpretation by the courts, the decision of the court in these cases was perfectly correct. That, however, does not lessen the appropriateness of the comment just quoted, but is rather an appeal to the people than to the judiciary.

The Supreme Court of New York furnished opportunity for an interesting discussion of the question of the proper punishment for different grades of professional misconduct on the part of attorneys, in the recent case of *Re* Reifschneider, 69 N. Y. Supp. 1069. In this case a father, as guardian of his injured child, desired to accept a railway company's offer to settle a damage suit for a sum which his attorneys thought inadequate. An attorney in the employ of the defendant railway company got himself substituted for plaintiff's attorneys by paying them a fee furnished by defendant, and then, in the capacity of plaintiff's attorney, advised and attempted to effect the settlement. The court was divided in opinion as to the degree of punishment; the majority decision holding that while the attorney was guilty of conduct which was very unprofessional, such conduct was not sufficiently flagrant to justify disbarment, but was properly punishable by reprimand. The minority opinion insisted on suspension or disbarment, and after calling attention to the New York statute on the misconduct of attorneys uses this

strong language: "The standard of honor among the members of the bar is high, and has been so maintained by the natural and instinctive probity and purity of the profession, and it should never be lowered by the action of the court. If a counselor refuses to sit down when told to do so by the court, or uses intemperate language, the occasion might justly admit of a rebuke or reprimand. But the framers of the law never meant that deliberate and persistent professional misconduct should be punished by a mere reprimand from the bench." We are inclined to favor the minority opinion to the extent of insisting that temporary suspension from practice would have been a more just and salutory punishment for the serious offense charged against this attorney. We are not unmindful of the fact, however, that this power in the court should not be exercised harshly, but in the wise discretion of the court after taking into consideration the surrounding circumstances, and the causes or motives which prompted the unprofessional action. And in this connection the plea of Justice Field in the case of Bradley v. Fisher, 13 Wall. 355, for a lenient policy in cases which are not exceedingly flagrant, can be wisely followed: "Admission as an attorney," says Justice Field, "is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and to their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should, therefore, never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine, would accomplish the end desired."

NOTES OF IMPORTANT DECISIONS.

FIXTURES—TAPESTRIES AFFIXED TO WALL—TENANT FOR LIFE—REMAINDER-MAN.—*In re* De Falbe, Ward v. Taylor (1901), 1 Ch. 523, reported in the *Canada Law Journal*, was a contract between the personal representatives of a deceased tenant for life and remainder-man, touching the right to remove certain tapestries which had been fixed by the deceased tenant for life to a mansion to which the remainder-man was entitled in remainder. The tapestries in question had been affixed to the walls of a drawing room in the following way: strips of wood were fastened on the walls by nails, canvas was then stretched over the strips, and the tapestries were then stretched over the canvas and fastened by tacks to it, and pieces of wood mouldings fastened to the walls were placed round each piece of tapestry. Portions of the wall not covered by tapestries were covered with canvas, which was colored so as to harmonize with the tapestries. Byrne, J., considered that the tapestries had been so affixed to the freehold as to be irremovable by the tenant for life or his personal representative, but the court of appeal (Rigby, Williams and Sterling, L. JJ.) took a more liberal view, and held that as the tapestries had been affixed to the walls merely for purposes of decoration, they were removable by the tenant for life or her representative, and though the latter should make good any damage to the wall occasioned by the removal, he was not liable for the cost of entirely redecorating the room. Although Williams, L. J., seems to think the principles laid down by Lord Romilly in D'Eyncourt v. Gregory, L. R. 3 Eq. 382, were not in conflict with the present decision, Rigby, L. J. did not hesitate to say that he thought the decision in that case was not right "if it would apply to such a case as the present" and ought not to be followed.

INTOXICATING LIQUORS—UNLAWFUL RESALE.—A very difficult question was encountered by the court in the case of Graves v. Johnson (Mass.), 60 N. E. Rep. 383. This suit was for the price of intoxicating liquors sold in Massachusetts. It was found that the plaintiff's agent supposed rightly, that the defendant intended to resell the liquors in Maine unlawfully, but that the plaintiffs and their agent were known by the defendant to be indifferent to what he did with the goods, and to have no other motive or purpose than to sell them in Massachusetts in the usual course of business. The court held that although the buyer of the liquor intended when he made the purchase to resell them in the state of Maine, contrary to the laws of that state, the seller's mere knowledge of the buyer's intent will not prevent recovery of the purchase price. The court makes the following argument:

"The defendant was free to change his mind, and there was no communicated desire of the plaintiffs to co-operate with the defendant's present intent, but on the contrary an understood indifference to everything beyond an ordinary sale in Massachusetts. It may be that, as in the case of attempts (Com. v. Peaslee [Mass.], 59 N. E. Rep. 55; Com. v. Kennedy, 170 Mass. 18, 22, 48 N. E. Rep. 770), the line of proximity will vary somewhat according to the gravity of the evil apprehended (Steele v. Curle, 4 Dana, 381, 385-388; Hanauer v. Doane, 12 Wall. 342, 346, 20 L. Ed. 439; Bickel v. Sheets, 24 Ind. 1, 4), and in

different courts with regard to the same or similar matters. Compare Hubbard v. Moore, 24 La. Ann. 591, and Michael v. Bacon, 49 Mo. 474, with Pearce v. Brooks, L. R. 1 Exch. 213. But the decisions tend more and more to agree that the connection with the unlawful act in cases like the present is too remote. McIntyre v. Parks, 3 Metc. 207; Sortwell v. Hughes, 1 Curt. 244, 247, Fed. Cas. No. 13,177; Green v. Collins, 3 Cliff. 494, Fed. Cas. No. 5755; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Distilling Co. v. Nutt, 34 Kan. 724, 729, 10 Pac. Rep. 163; Webber v. Donnelly, 33 Mich. 469; Tuttle v. Holland, 43 Vt. 542; Braunn v. Keatly, 146 Pa. 519, 524, 23 Atl. Rep. 389; Wallace v. Lark, 12 S. Car. 576, 578, 32 Am. Rep. 516; Rose v. Mitchell, 6 Colo. 102; Jameson v. Gregory's Exr., 4 Metc. (Ky.) 363, 370; Bickel v. Sheets, *supra;* Hubbard v. Moore, *supra;* Michael v. Bacon, *supra.*"

DAMAGES — DISTINCTION BETWEEN LIQUIDATED DAMAGES AND A PENALTY.—When the courts depart from the ordinary practice of judging of the intention of the parties to a contract by the words they have used, and look beyond the words to discover that intention in the circumstances of the transaction, they embark upon a course of doubtful utility and open the way for litigation. Such has been the case with the well-known line of decisions as to the effect of describing a fixed sum made payable upon a breach of contract as either a penalty or liquidated damages. These expressions do no more than give a *prima facie* indication of the meaning of the parties, and before it can be said with any confidence that a sum is a penalty—so as in effect to give a right only to unliquidated damages—or liquidated damages—so as to give a right to recover the specified amount—a careful inquiry must be made as to the relation between this sum and the nature of the breaches in respect of which it is payable. It is probable that the whole doctrine in question arose from the absurdity of allowing payment of a fixed sum as liquidated damages to be enforced on breach of an agreement to pay a fixed smaller sum, and in such cases the larger sum is treated as a penalty, notwithstanding that the language used indicates the contrary. Astley v. Weldon, 2 B. & P. 346. On the other hand, a fixed sum made payable on the breach of a single stipulation, not itself involving payment of a sum of smaller amount, will be treated as liquidated damages. Of this nature were the sums fixed in *Re* An Arbitration between White and Arthur (Time, 3d inst.), decided by a divisional court (Kennedy and Phillimore, JJ.) recently. A contract had been made for the installation of electric lighting in a theater which was in course of erection. Upon non-completion of part of the work by a certain date a "penalty" of £15 a day was to be payable, and upon non-completion of the remainder by another date, a "penalty" of £3 a day so long as the respective portions of the work remained unfinished. These sums were made payable each in respect of a breach of a single stipulation not involving payment of money, and hence, according to the test stated above, they were liquidated damages, notwithstanding that they were described as penalties. In Law v. Local Board of Redditch (1892), 1 Q. B. 127, the circumstances were similar, save that the sum was there described as "liquidated damages," and it was held to be such. The decision in the present case was to the same effect. A different case arises where the sum is made payable upon breach of any one of a number of stipulations. Usually it will be treated as a liquidated sum, but if the breach of one or more of the stipulations involves payment of a smaller fixed sum of money, or is trivial in its nature, then the opposite construction prevails, and the sum payable, being a penalty, is reduced to the amount of the loss actually sustained Wallis v. Smith, 31 W. R. 214, 21 Ch. Div. 243; Elphinstone v. Monkland Iron Co., 35 W. R. 17, 11 App. Cas. 332.—*Solicitors' Journal.*

TAXATION—EXEMPTION OF PROPERTY USED PARTLY FOR RELIGIOUS SERVICES AND PARTLY AS A SOURCE OF REVENUE.—A most valuable annotation on the right of exemption of property used for religious or charitable purposes, but also as a source of revenue for the same purposes, appears in the opinion of Bartch, J., in the recent case of Parker v. Quinn (Utah), 64 Pac. Rep. 961. In that case a society organized exclusively for mission work and other charitable purposes owned certain premises in Salt Lake City. The upper floor of these premises was used for meetings and other work of the society, while the lower floor was rented out at $25 per month, and the income used entirely in carrying on the work of the society. In a suit to enjoin the assessment and taxation of the property, the court held that only that portion of the property of a religious or benevolent society which is occupied and used exclusively for the purpose for which the society was organized, is exempt from taxation, and that the exemption does not extend to that portion not appropriated by the society to its own use, but held as a source of revenue, especially when the value of each portion is separately ascertainable. After alluding to the statutes specifying what property should be exempt from taxation, the court said:

"Among the several classes of property exempt are 'lots with the buildings thereon used exclusively for either religious worship or charitable purposes.' Only such of the society's property, therefore, as is occupied and used exclusively for charitable purposes, is exempt from taxation. It follows that the exemption does not extend to that portion not appropriated by the society to its own use, but held as a source of revenue. Especially is this so since the value of each portion is ascertainable, as appears from the findings of the court. Where, therefore, as in this case, a portion of certain property owned by

a charitable institution is occupied and used by it for charitable purposes, and the other portion thereof is devoted to purposes of revenue, the portion used and occupied for charitable purposes is exempt, and the portion not so used and occupied is subject to taxation. "We are aware that a few cases hold that under such circumstances the exemption is lost as to the whole property, and that some, on the contrary, hold that the whole property is exempt. We think, however, that the weight of authority is in harmony with the rule above stated, and that the disposition of this case in accordance therewith is equitable and just. In City of Philadelphia v. Barber, 160 Pa. 123, 28 Atl. Rep. 644, it was held: 'Where a part of a building is used for church purposes, and certain rooms in the building are rented for a school, the building may be divided for the purposes of taxation, and the portion used solely for church purposes be declared exempt from taxation.' County Comrs. of Frederick Co. v. Sisters of Charity of St. Joseph, 48 Md. 34, is a case where the proof showed that, among other improvements which were claimed by the appellees, a society organized for charitable purposes, to be exempt, there were one or more buildings in which a number of schools were required to pay tuition at the rate of $250 per annum; and the court held that so much of the property as was appropriated to this secular and educational purpose 'for revenue' was taxable, notwithstanding the fact that the 'surplus revenue' thus derived was devoted to charitable uses." The court cites the following recent authorities as sustaining its position: Sunday School Union v. City of Philadelphia, 161 Pa. 307, 29 Atl. Rep. 26; Detroit Young Men's Soc. v. Mayor, etc., of City of Detroit, 3 Mich. 172; Trustees of Chapel of Good Shepherd v. City of Boston, 120 Mass. 212; City of Cambridge v. County Comrs. of Middlesex, 114 Mass. 337; Appeal Tax Court of Baltimore City v. St. Peter's Academy, 50 Md. 321; Appeal Tax Court of Baltimore City v. Grand Lodge A. F. & A. M., *Id.* 421, 429: Redemptorists v. Howard Co. Comrs., *Id.* 449; Ft. Des Moines Lodge v. Polk Co., 56 Iowa, 34, 8 N. W. Rep. 687; Mulroy v. Churchman, 52 Iowa, 238, 3 N. W. Rep. 72; Society v. Kelley, 28 Oreg. 173, 42 Pac. Rep. 3; Elizabeth Library Assn. v. Leester, 28 N. J. Law, 103; First M. E. Church v. City of Chicago, 26 Ill. 482; Presbyterian Theological Seminary v. People, 101 Ill. 578; State v. Board of Assessors, 35 La. Ann. 668; State v. Ross, 24 N. J. Law, 497; Massenburg v. Grand Lodge, 81 Ga. 212, 7 S. E. Rep. 636; Morris v. Lone Star, 68 Tex. 698, 5 S. W. Rep. 519; Bank of Commerce v. State, 104 U. S. 493, 26 L. Ed. 810; Young Men's Christian Assn. v. Mayor, etc., of City of New York, 113 N. Y. 187, 21 N. E. Rep. 86.

Before dismissing this subject, it might be well to call attention to the authorities holding a different rule. Thus, in Missouri, it is held that a hospital building is not excluded from the benefits of a statute exempting from taxation property used for "purposes purely charitable," merely because certain patients pay for what they receive, where it appears that any profit derived therefrom is applied exclusively to the charitable purposes of the institution. State v. Powers, 74 Mo. 476. Also, the case of North St. Louis Gymnastic Society v. Hudson, 12 Mo. App. 342, affirmed 85 Mo. 32, in which it was held that a school building exempted from taxation "so long as it is used only for the purpose of education," is not made taxable by the renting of a room therein for other purposes when the proceeds thereof are used exctusively for the benefit of the schools. The following authorities hold that whenever part of the property alleged to be exempt is used for other than the exempt purposes, the whole becomes taxable. Red v. Johnson, 53 Tex. 284; St. Mary's College v. Crowl, 10 Kan. 451; Morris v. Lone Star Chapter, 68 Tex. 698.

VESTED INTEREST OF BENEFICIARY UNDER A POLICY OF LIFE INSURANCE.

The character of the beneficiary's interest under a policy of life insurance is a question of growing importance, and one often litigated. Its difficulty lies in the fact that it is comparatively a new question, having sprung into existence contemporaneously with modern life insurance, and at once assuming many different and surprising aspects. In the light of the common law a policy of life insurance was nothing more or less than a contract entered into between two parties for the benefit of a third party. In Langdell's Cases on Contracts,[1] the learned author says: "In truth, a binding promise to A to pay one hundred dollars to B confers no right upon B in law or equity. It confers no authority upon the promisor to pay the money to B, but the authority may be revoked by A at any moment." In the light of modern statutes and public sentiment, however, a life insurance policy is something more than a mere contract between two parties for the benefit of a third. The contingency upon which payment is to be made is the death of one of the parties, and the consideration, the payment of certain stipulated premiums, the amount of which is determined by the probabilities of life in the obligee. It is evident that unless sustained for other reasons such an agreement would have all the earmarks of a wagering contract,

[1] Langdell, Cases on Contracts (2d Ed.), p. 1021.

and, therefore, void on grounds of public policy. There is only one reason which will sustain such a contract, *i. e.*, that the third party for whose benefit the contract is made is not a disinterested party, his pecuniary interest in the life of the obligee, and in the contingency upon which payment is to be made, giving him the right to enforce the agreement. A contract of this kind is usually made for the benefit of wife or children or others dependent upon or having some pecuniary interest in the life of the insured, and is in the nature of an irrevocable trust conferred upon interested parties for their protection and indemnity against pecuniary loss by reason of his death in their lifetime.[2] This is undoubtedly the origin, and certainly the only reason for the modern doctrine of vested interest. Statutes which have hedged about the interest of the wife and children to the proceeds of insurance policies, of which they were the beneficiaries against the claims of creditors or the act of the insured himself, while giving force to the rule and defining public sentiment, were not necessary to its existence nor gave any reason for its extension.[3]

The clearest statement of what is known as the doctrine of vested interest, in its application to the construction of life insurance policies, is to be found in the opinion of Fuller, C. J., in the case of Central Bank v. Hume,[4] where the learned judge said: "We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no powers of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts which belong to the beneficiaries to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or will, to transfer to any other person the interest of the person named." This statement of the law, as the general rule upon this subject, is sustained by the overwhelming weight of authority.[5] The only authority holding to an absolutely contrary doctrine is to be found in the decisions of the Supreme Court of Wisconsin.[6]

To exactly define just what he meant by "vested interest" is not an easy undertaking, and the authorities themselves lend us very little assistance. In the effort to literally interpret this doctrine and apply it logically to all cases many difficulties are encountered. Suppose by the terms or nature of the contract the interest of the beneficiary is contingent upon surviving the insured, or, as in endowment policies, contingent also on surviving the insured within the endowment period, or, as in accident policies, contingent not only on survivorship within a definite time (accident policies being generally in force for only one year at a time), but also contingent on the injury causing the death of the insured being the result of an accident of the particular description named in the policy. In such cases can the interest of the beneficiary, which is plainly contingent as to its enjoyment, be considered at the same time and for some purposes as vested. These difficulties, in aggravated form, were encountered by the court in the case of Lockwood v. Insurance Co.[7] In this case the policy was payable to the insured in twenty years, if living; but in case of his death before the completion of the endowment period, then to A, if living, and, if not, then to B and C. The court said: "The brief of the plaintiff is based upon the theory that the interests of the beneficiaries were contingent, that the insured could deal with the policies as he chose. Such, however, is not the rule of law governing contracts of life insurance.

[2] See Ryan v. Rothweiler, 50 Ohio St. 595.
[3] Hubbard v. Stapp, 32 Ill. App. 541.
[4] 128 U. S. 195.
[5] Pingrey v. Insurance Co., 144 Mass. 374; Chapin v. Fellowes, 36 Conn. 132; Glanz v. Gloeckeler, 104 Ill. 573; Small v. Jose, 86 Me. 120; Lockwood v. Insurance Co., 108 Mich. 334; Splawn v. Chew, 60 Tex. 532; Johnson v. Hall, 55 Ark. 210; Smith v. Insurance Co. 44 Atl. Rep. 531; Wilmaser v. Insurance Co., 66 Iowa 417; Packard v. Insurance Co., 9 Mo. App. 469; Van Bibber v. Van Bibber, 82 Ky. 347; Allis v. Ware, 28 Minn. 166; Brown's Appeal, 125 Pa. St. 303.
[6] Clark v. Durand, 12 Wis. 223; Kernan v. Howard, 23 Wis. 108; Breitung's Estate, 78 Wis. 33.
[7] 108 Mich. 334.

The beneficiaries upon the execution of the policy acquire thereby an interest which the law recognizes and which the insured cannot dispose of at his own will. This interest is recognized by the authorities, and it is of little consequence whether it is called vested or contingent." Without presuming to reconcile the cases which attempt to define the interest of the beneficiary in a regular life policy, we would suggest that much of the difficulty would be removed if the origin of the doctrine be kept clearly in mind. As already suggested, the only reason upon which an insurance policy can be held a valid contract is the interest of the beneficiary in the life of the insured, a contract of insurance, for instance, upon the life of the husband in favor of the wife, being in the nature of an irrevocable settlement or trust for the purpose of protecting her against pecuniary loss and damage by reason of his death in her lifetime. When we thus consider a policy of life insurance as more nearly resembling and partaking of the nature of a trust than a chose in action, we make easy the solution of many otherwise difficult problems, and effectuate more closely the intention of the parties.

Let us examine the authorities and carefully bear in mind the suggestions just offered. Take, for instance, the simple case of a wife, the beneficiary under a policy of insurance on the life of her husband, who predeceases the latter. Are her representatives or his representatives entitled to the proceeds? In other words, under a literal construction of the doctrine of vested interest, is her interest transmissible to her beirs, or, looking upon the proceeds of the policy as a trust fund, would her death within the lifetime of the husband be considered a termination of her interest in his life which alone sustained the policy in her, and, therefore, a failure of the trust with reversion in the husband. The authorities are in conflict, some holding to the former[8] and others to the latter construction.[9] In Ryan v. Rothweiler,[10] the court said: "The theory of a failure of trust comes with more force and stronger reasons than the doctrine of choses in action. We regard the doctrine of choses as action as not fully applicable, because it conflicts in many cases with the controlling doctrine of insurable interest. The question is not as to change of beneficiary, but as to reverter of the policy to the assured by reason of the death of all the beneficiaries. On principle, and aside from any statute on the subject, we think that in this case the policy reverted to Mr. Helwig, and at his death became a part of his estate. It seems to us that this was the manifest intention and understanding of all parties interested, and that the result is just and equitable. While there may have been a vested interest it was an interest not in possession, but in expectancy, liable to be devested by the death of the beneficiary before the death of the assured." In the case of a policy on the life of the husband payable to the wife, if living, and if not living to her children, where the wife dies first, the authorities are again in conflict, some holding the policy payable exclusively to the children living at the death of the insured,[11] while others hold that the policy vests at once in both wife and children at the same time, and the interest of any deceased child is transmissible to his heirs.[12] In Hooker v. Sugg[12a] it was held that if "children" be designated in a life policy as beneficiaries, the interest vests at once in such as then meet the description, and is not devested in favor of survivors by a death afterwards. As already noted, New York and several other states reject this view and apply the class doctrine to such policies, so that under the rule there laid down only such children take as are alive at the death of the insured. We believe that the New York rule recognizes more clearly the evident purpose of life insurance and lays down the more equitable and reasonable construction.

[8] Drake v. Stone, 58 Ala. 133; Harley v. Heist, 86 Ind. 196; Libby v. Libby, 37 Me. 359; Insurance Co. v. Baldwin, 15 R. I. 106; Small v. Jose, 86 Me. 120.

[9] Gambs v. Insurance Co., 50 Mo. 44; Ryan v. Rothweiler, 50 Ohio St. 595; Johnson v. Van Epps, 110 Ill. 501; Haskins v. Kendall, 158 Mass. 224; Bickerton v. Jacques, 28 Hun, 119; Rollins v. McHatton, 16 Colo. 203

[10] 50 Ohio St. 595.

[11] United States Trust Co. v. Insurance Co., 115 N. Y. 115; Schneider v. Insurance Co., 33 Mo. App. 68; Walsh v. Insurance Co., 133 N. Y. 408; Robinson v. Duval, 79 Ky. 83; Insurance Co. v. Hoffman, 110 Ill. 603; Insurance Co. v. Webb, 54 Ala. 688.

[12] Hooker v. Sugg, 102 N. Car. 115; Glenn v. Burns (Tenn. 1898), 45 S. W. Rep. 784; *Re* Conrad, 89 Iowa, 396; Conigland v. Smith, 79 N. Car. 303; Insurance Co. v. Palmer, 42 Conn. 60.

[12a] 102 N. Car. 115.

Life insurance exists solely for the protection of those who would be pecuniarily damaged by the insured's death. To permit those who would not be so damaged to take under the policy would be to overturn the whole purpose and intent of such contracts. Indeed, the doctrine of vested interest, as applicable to insurance contracts, cannot be carried out logically and literally,—the word "vested" having a legal significance too great and too extended to properly define the rights and interest of the beneficiary. Nothing more can be meant by the use of such words as applicable to life insurance, than that the beneficiary named in the policy has such an interest in the policy that prevents the insured from interfering in any manner with her right to take under the policy, or to demand the proceeds upon the happening of all contingencies and upon compliance with all the conditions contained therein.

It has been suggested that the doctrine of vested interest cannot be applied to accident insurance.[13] In Hoffman v. Indemnity Co.,[13a] the court held that the beneficiary in an accident policy, until the death of the insured, has, at most, an inchoate and contingent interest, and the insured cannot recognize her as a party to the contract having a present interest therein. This case did not squarely decide the question that the interest of the beneficiary was materially different from that of the beneficiary under a regular life policy, but clearly shows how illogical would be a literal application of the rule of vested interest to the right of a beneficiary, where that right, under the terms of the policy, is the most inchoate and contingent that can be imagined. In the case just referred to, a condition in an accident policy required the beneficiary to give notice of the death of the insured within ten days of the happening of the accident causing it. Such a condition was held to be impossible, on the ground that the beneficiary acquired no definite interest in the policy until the death of the insured. Another late authority suggesting any difference between regular life and accident policies is the case of Standard Life & Accident Insurance Co. v. Carroll.[14] In that case the exact decision was that a statute of Pennsylvania declaring that in all controversies relating to "life and fire insurance policies," neither the constitution nor by-laws, etc., of the company should be received in evidence, does not include policies of insurance against bodily accident. The court said: "The suggestion that the act includes policies of insurance against bodily accidents seems to us to be quite inadmissible. The instrument sued on here is strictly an accident insurance policy. The primary purpose is to secure a weekly indemnity in money to the insured in the event of his disability from accidental injury. In certain specified contingencies, resulting from accidental injury, a specified gross sum is to be paid. One of the latter is, death resulting from the accident within ninety days thereafter. But this contingent provision does not make the instrument a life insurance policy, either in a popular or in a legal sense." These are the only two cases that have come within the knowledge of the writer suggesting that accident policies, with provisions for death benefits, were to be distinguished in any material manner from regular life policies. The question seems to be as yet an open one whether the beneficiary, under such a policy, acquires a vested interest or not. We apprehend that, giving the word the limited significance already suggested, *i. e.*, the absolute, irrevocable right to demand the proceeds of the policy on the happening of all contingencies and compliance with all conditions, there is no material distinction to be made between such policies and regular life insurance. But if by vested interest is meant any absolute present right or interest in the proceeds of the policy (which we believe in any case to be an unwarranted extension of the right of the beneficiary), then its application is, on the face of things, an absurdity.

Endowment policies have also been suggested as being without the rule of vested interest.[15] But for the same reason we have just discussed in the case of accident policies, we believe any distinction untenable.[16] The interest of the beneficiary is as irrevocable in

[13] Hoffman v. Indemnity Co., 56 Mo. App. 301.

[13a] 56 Mo. App. 301.

[14] 86 Fed. Rep. 567.

[15] Tennes v. Northwestern Mut. Life Insurance Co., 26 Minn. 271.

[16] Pingrey v. Insurance Co., 144 Mass. 374; Lockwood v. Insurance Co., 108 Mich. 334; Lemon v. Insurance Co., 38 Conn. 294.

an endowment policy as in a regular life policy, and the insured can no more interfere with this right in the one case than in the other. Of course, the enjoyment of the proceeds is contingent upon the insured dying within the endowment period, and the beneficiary cannot be said to have any present interest, other than the mere right to demand the proceeds of the policy, upon the happening of all contingencies and compliance with all the conditions of the policy, which is the same right held by any other beneficiary in any other kind of policy.

The difficulties of this question are increased when it becomes complicated with questions of survivorship. Suppose the insured and the beneficiary perish in a common disaster, and it is impossible to find, as a fact, from the evidence, which of them died first,—in such a case in whom does the right to the proceeds exist? The modern rule as to survivorship in a common disaster is well stated and thoroughly discussed in the case of Newell v. Nichols.[17] The rule may be summarized as follows: There are no presumptions in law of survivorship in case of persons who perish by a common disaster, but one who claims through a survivorship must prove the survivorship. In the absence of other evidence, the fact is assumed to be unascertainable, and the property rights are disposed of as if death occurred at the same time, not because of a presumption of simultaneous death, but because there is no evidence or presumption to the contrary. In applying this rule to the distribution of the proceeds of a policy of insurance, the doctrine of vested interest becomes an obstacle of grave importance. Of course, if the policy is payable to the wife "and her legal representatives," the interest of the wife is, in such case, transmissible, and the question of vested interest presents little difficulty. But where the policy is payable simply to the beneficiary on the death of the insured, or "if surviving," or on any other condition, the question of vested interest assumes an importance, according to the meaning given to the word "vested," and especially so in the case where both insured and beneficiary perish in a common disaster. The same conflict of authority exists here which has been observed under other aspects of this question. Giving the word "vested" its full logical meaning, the beneficiary would have such a present interest in the proceeds of the policy, while living, that even where the enjoyment of the fund is conditioned on her survivorship, such condition, or, in fact, any other condition annexed to her right to take under the policy, would be a condition subsequent, and the burden of proving survivorship would be, not on the beneficiary or her representatives, but upon those who would seek to controvert her *prima facie* title to the proceeds of the policy.[18] But, on the other hand, applying the trust fund doctrine and giving to the words "vested interest" the limited meaning already suggested, the beneficiary would acquire no present interest in the proceeds until the death of the insured, and the distribution of the fund would then be governed by the ordinary rules of construction, and the beneficiary could take nothing until all contingencies and conditions of the policy had happened or been complied with, the burden of proof in such case resting upon her or her representatives.[19] In the case of Cowman v. Rogers[20] the regulations of a beneficial association provided that, if the beneficiary named in the certificate should die in the lifetime of the member, and if the latter should make no other disposition of the benefit, it should be paid to the member's widow, if no widow then to the children; if no widow or children, then to his relatives, naming them. The certificate in this case was made payable, upon the member's death, to his wife. The member, together with his wife and children, perished in the Johnstown flood. Held, that there was no presumption of survivorship, and in the absence of competent and sufficient evidence to show that the wife, the nominated beneficiary, died before her husband, her legal representative was entitled to the fund. As a logical application of the doctrine of vested interest no criticism can be found with this decision, but the inequitable result, to which a strict application of the doctrine has led the court in this case, shows clearly that it is not the right principle upon which to decide such

[17] 75 N. Y. 78.

[18] Cowman v. Rogers, 73 Md. 403.

[19] Fuller v. Linzee, 135 Mass. 468; Paden v. Briscoe, 81 Tex. 563.

[20] 73 Md. 403.

questions. The husband in this case procured the policy for the benefit and protection of his wife and children after his death, and for this purpose alone he faithfully kept up the payment of the premiums thereon. It is no stretch of the imagination to say that it certainly was not his intention that this entire fund should, under any circumstances, become the property of distant relatives of his wife, who had no interest whatever in his life. It is more natural to suppose that in such case he would prefer his own estate or his own relatives as the beneficiaries of the fund. That the intention of the insured is material in these cases has been decided on good authority.[21] But apart from any question of intention, the application of the trust fund doctrine easily disposes of the whole question. Under this view of the case, the beneficiary is regarded as the *cestui que trust*, and the insurance company as the trustee of the fund represented by the policy, of which the insured may be regarded as the grantor. The fund is to be paid over to the beneficiary, or *cestui que trust*, on the happening of all contingencies and compliance with all conditions named in the policy. The insurance company, as trustee, can certainly not be compelled to execute the trust until all contingencies have happened and all conditions complied with, and the burden is upon the beneficiary, or her representatives, as against the insurance company, to prove that all contingencies have happened and all conditions have been complied with, before any title to the fund vests in her; and unless her right to the fund is so proven there is a failure of the trust and reversion of the fund to the insured or his representatives. Where the policy provides that the beneficiary shall take, "if surviving," no difficulty should arise in any view of the case, as, in such case, survivorship is clearly a condition precedent to the enjoyment of the fund, and upon the representatives of the beneficiary must be the burden of proving survivorship before they are entitled to take anything under the policy. In Fuller v. Linzee[22] the policy provided that "in case the said insured should die before the decease of her husband," the amount of this insurance should be payable to their children. The husband and wife and their children were lost at sea, and there was no direct evidence as to which survived the other. The court held that the interest of the wife in the policy was contingent on her surviving her husband, and that the burden of proof was on her next of kin to show that she survived. The court said: "He (the insured) was providing for the disposition of a fund, which was not to exist until after his death, and he made the provision by designating the persons to whom it was to be paid, and his obvious intention was that it should be paid to his wife, if she should survive to take it, and to their children if she should not survive. * * * We think, upon the view of the contract already taken, that the wife had no interest, transmissible to her next of kin unless she survived her husband, and that they cannot maintain their claim without proof that she survived him."

We have taken but a general view of this question, and have earnestly sought for right principles rather than to attempt to harmonize the conflicting opinions of the courts in the decision of individual cases. Courts, in their zeal to protect the wife and children, have undoubtedly been led into the use of words in defining the interest of such parties as beneficiaries of insurance, which do not properly limit their rights under the policy, and which in many cases, could not be literally enforced without doing violence to all principles of life insurance and arriving at results that could not be other than inequitable. The great purpose of such contracts in making provision for the protection of those interested in the life of the insured, against pecuniary loss by reason of his death in their lifetime, should be kept constantly in view, and the assertion of no legal quibbles or technicalities should be permitted to defeat the clear intention of the insured under a reasonable construction of the plain terms of the contract.

ALEXANDER H. ROBBINS.

St. Louis, Mo.

[21] Robinson v. Duval, 79 Ky. 83.
[22] 135 Mass. 468.

CRIMINAL LAW—CONTEMPT—ATTORNEY—INVALID ORDER—FAILURE TO OBEY.

EX PARTE DUNCAN.

Court of Criminal Appeals of Texas, April 24, 1901.

An order of court, appointing a committee to examine a candidate for admission to the bar, failed to fix a time for the examination, as required by Rev.

Civ. St. art. 256, but the court inquired of an attorney if he could act on the committee on the evening of a cer tain day, and the attorney answered that he could not be present at a night examination, but was placed on the committee, the judge stating that he should be excused if he could not attend. Held, that the attorney was not guilty of contempt in failing to appear at such time, since the order, though considered in connection with the oral statement of the court, was ncomplete and invalid; and where the attorney is arrested and brought into court under a judgment and attachment for contempt in failing to appear at such examination, he is not guilty of contempt in refusing to continue the examination as then directed by the court, since his presence was obtained by an illegal arrest, and he had the right to refuse to serve while under such duress.

DAVIDSON, P. J.: This is an original application for the writ of *habeas corpus*. Relator was appointed one of five attorneys to examine an applicant for admission to practice law. The order appointing this committee was entered on March 16th. The order failed to designate any time when the examination should occur. On the 16th of March, relator being in the court room, the presiding judge asked him if he could serve upon the committee, and was informed, if it did not occur at night, he could do so, but if at night it would be impossible for him to attend by reason of the fact that he lived remote from the court house, and could not leave his wife alone at night. The district clerk states the judge then informed relator that he would appoint him anyway, and if he could attend to do so, and, if not, "of course I will excuse you." On the night of the 20th of March, all of the committee failed to attend except Hon. Cone Johnson. The judge fined the absent attorneys $25 each, and ordered the clerk to issue attachment. These orders were not entered of record, but the attachment was issued, and the next morning was served upon relator, Duncan, in his office by two deputy sheriffs, who immediately escorted him to the court room, where he took a seat in front of the judge's stand. A few minutes afterwards Judge Russell, the district judge, took the bench and said, "Gentlemen, proceed with the examination." Relator arose and said, "I decline to serve on this committee." The judge replied, "Judge Duncan, I cannot excuse you;" to which relator replied: "I cannot help that. I will not serve. I told the court at the time of my appointment that I could not serve on an examination committee to meet at night, and gave the court my reasons for it. Now, I have been arrested at my office this morning, and brought over here under arrest by officers, under the order of this court, for failing to be present last night. I have always treated this court as a gentleman, and I expect to be treated or must be treated by the court as a gentleman, if not as a member of the bar." The court replied, "I will not sit here and allow you to reprimand the court, and I will fine you if you do not desist from it." "I then took my seat, saying, 'Well, if you fine me, and I have the money to pay the fine, I can pay it; if not, I will have to go to jail.'" The court then said, "Mr. Clerk, enter a fine of $50 against Judge Duncan for contempt of court." It is shown by the evidence that it has never been the practice at that court, or in that district, for the judge to compel members of the bar to serve on such examining committees, and never before, in the knowledge of witnesses, was a fine assessed against, or an attachment issued for, a member of such committee who failed to attend; that the custom was either to postpone on account of the absence of one or more of the committee, or proceed with the examination by the appointment of other members of the bar. Relator further states that he had no intimation in any way from the judge at any time, after stating his reasons for not being able to attend the meeting of the committee at night, that he would still be expected to attend or be fined or attached; and that he had no notice or knowledge, or any reason to suspect, until the morning of the 21st, that he was fined, or was to be fined or arrested, and that the facts recited in the judgment of contempt rendered against him were placed there without his knowledge, and that he had no opportunity to see that the facts were correctly stated in the judgment; that it was wholly *ex parte*, and was prepared entirely under the direction of the trial judge.

This case involves and turns upon the question of jurisdiction. If the jurisdiction of the court properly attached to the person of the relator and the subject-matter of the contempt, and the facts showed contempt, then this writ should be refused, and the relator remanded. Article 256, Rev. Civ. St., provides: "During the term of the district court upon application in writing of any person desiring to obtain a permanent license to practice as an attorney and counselor at law in the courts of this state, the court shall, as soon as convenient, appoint a committee of three or more practicing attorneys of good standing, and set a day for the examination of the applicant, on which day the committee so appointed shall in open court proceed to examine the applicant; and if they or a majority of them and the court are satisfied of his legal qualification, a report of that fact shall be made." The district courts of this state being courts of record, every order made by such court must be entered of record. Upon the presentation of the application, it becomes the duty of the court to appoint a committee, naming them; and this appointment, together with the day appointed, must appear from the records to have been made as any other judicial order must so appear. Until this has been done, and the members of such committee have been notified, the court has no power to compel any member of the committee to proceed with the examination of such applicant. The question then presented is, did the court have the power to issue the attachment to compel the appearance of the relator? If it did, it must be held relator

was in contempt, and the court had the power to punish, not only for the disobedience of its order originally made, but to enforce its orders subsequently made by fine or imprisonment, and to punish for refractory conduct on the part of the relator. If, on the other hand, it had no power to compel the attendance of the relator by the attachment as issued, then, the appearance of the relator being an enforced appearance, without sanction of law, the court had no power to punish, by either arrest under the writ of attachment, or for the subsequent acts of relator, while in such duress, in questioning or demanding, in a respectful manner, the right of the court in ordering his arrest, or in seeking to compel him to serve on the committee. It is conceded from the evidence before us that the application to be examined for license to practice as an attorney and counselor at law was filed by an applicant; that on the 16th of March an order was made and entered of record on the minutes of the court appointing relator and four other attorneys as such committee. But from this order, which is also in evidence, it is observed that no day was set or mentioned when the examination should occur. However, on the morning of the 16th of March, while relator was in the court room, the district judge inquired of him as to whether he could serve on said committee on the 20th of March. He replied: "I could not serve on any committee to examine an applicant at night; that I could not come down at night, on account of living so far out, as my wife would be left alone should I leave." To this relator testifies that he heard no reply, but is sure that the district judge did not dissent. The district clerk, however, states that the judge replied to relator, "Well, judge, I will put you on (or leave you on), as it might be that you can come down; and, if not, of course I will excuse you." These facts are undisputed. Neither the order of the court, as made of record, nor the request of the judge to the relator to be present and take part in the examination, can form the basis for this proceeding in contempt. The order, to have been the subject of disobedience, must have been complete and perfect within itself. It was not complete. No attorney, from an inspection of the order, could say, without aid from other evidence, at what time the examination would be held, and, as no time was fixed by it for the examination, it cannot be said that relator in any way disobeyed such order. True, taken in connection with the oral statement of the judge, relator might have known that the examination would be held at 8 p. m. on the 20th of March, but in cases of this kind this is not sufficient. It is the disobedience of the order of the court as rendered and recorded which must constitute the basis of this proceeding. Stress is laid upon this from the fact that it is this order which is claimed to have first been disobeyed, and which gave rise to the subsequent proceedings. Nor can it be said, assuming that it is within the power or province of the judge to aid a recorded order by oral statements *aliunde* such record, that the request of the judge to relator, Duncan, was in any sense such order or command, or so regarded by the judge at the time, as to be the subject of disobedience, so as to form the basis of a contempt proceeding. It was, at most, a mere request, and evidently so understood at the time by the judge, relator, and the district clerk; and the manner in which the judge informed relator, Duncan, if he could not comply with it, would form the basis of relator's belief that he was excused from attendance. Where the court seeks to punish either by fine, arrest, or imprisonment, for the disobedience of an order or command, such order or command must carry with it no uncertainty, and must not be susceptible of different meanings or constructions, but must be in the form of a command, and, when tested by itself, must speak definitely the meaning and purpose of the court in ordering. There being no such order as relator was required to obey, and there being nothing in his conduct remotely bringing him within contempt, the action of the judge in ordering the writ of attachment was absolutely void and without jurisdiction. His arrest was for no offense, either actual or constructive. The court, so far as relator was concerned, was without jurisdiction as to the subject-matter or person, and had no authority to impose the fine of $25 originally imposed, whether entered of record or not.

But it is contended the court rightfully punished relator by a fine of $50, when brought before the court in arrest by virtue of the writ of attachment, on the 21st of March; that here the contempt was committed in the presence of the court, by words spoken by relator and from his manner; and that the facts recited in the judgment were conclusive. The writ of attachment being void, because issued without authority, the court at no time rightfully obtained jurisdiction over his person. His presence in the court room was illegally enforced, and he had the right, in a respectful manner and by decorous language, in the presence of the court, to protest against the unlawful arrest and seizure of his person, and while thus in duress to refuse to serve upon the committee. If the original order was not sufficient to require obedience, certainly no illegal arrest under such order would add weight, strength, certainty, or validity to it; and, if the court had no power to render the particular judgment against relator in aid of which the writ of attachment was issued, certainly the jurisdiction of the court could not be so enlarged when the jurisdiction was originally wanting. There is nothing in evidence before this court, outside the facts recited in the judgment entered on the 21st of March, which shows that relator made use of any language in any way discourteous, or which could have been, under the circumstances, construed in any other way than an indignant protest of an unoffending citizen against the unlawful arrest and humiliation to which he had been

subjected, without legal authority; nor was his manner offensive or discourteous, but, upon the contrary, all the evidence (the facts recited in the judgment excepted) show that neither his language nor manner was in any respect offensive, such as to form the basis for the proceeding in contempt. A judgment which is void is conclusive of nothing, and may be the subject of inquiry in a collateral proceeding. The recited facts therein are not binding in any way nor for any purpose. Nor can the court make contempt of that which is not contempt (Church, Hab. Corp. § 152); and every attempt to do so would be in excess of authority or jurisdiction, as much so as if the court had no authority or power to punish for contempt, either in relation to the person or subject-matter. There must be contempt in order to justify punishment for that offense. "There are three essential elements necessary to render conviction valid. These are that the court may have jurisdiction over the subject-matter, the person of the defendant, and the authority to render the particular judgment. If either of these essential elements are lacking, the judgment is fatally defective, and the prisoner held under such judgment may be released on *habeas corpus*." *Ex parte* Degener, 30 Tex. App. 576, 17 S. W. Rep. 1111; *Ex parte* Taylor, 34 Tex. Cr. Rep. 591, 31 S. W. Rep. 641; *Ex parte* Tinsley, 37 Tex. Cr. Rep. 517, 40 S. W. Rep. 306; *Ex parte* Kearby, 35 Tex. Cr. Rep. 531, 34 S. W. Rep. 635; *Id.*, 35 Tex. Cr. Rep. 634, 34 S. W. Rep. 962; Brown, Jur. §§ 109, 110; *Ex parte* Lake, 37 Tex. Cr. Rep. 656, 40 S. W. Rep. 727. "Some of the older authorities regard jurisdiction of the matter and the prisoner sufficient to give the court jurisdiction to pronounce the judgment, which could not be successfully assailed by this writ. The rule now, supported by high and abundant authority and excellent reason, is that the court must not only have jurisdiction over the person and the matter, but authority to render the particular judgment. The judgment is not conclusive upon the question of the authority of the court to render it. That, as well as any other matter which would render the proceedings void, is open to inquiry." 7 Am. & Eng. Ency. Law (2d Ed.) p. 36; People v. Liscomb, 60 N. Y. 559; People v. Court of Oyer & Terminer, 101 N. Y. 245, 4 N. E. Rep. 259, 54 Am. Rep. 691; *Ex parte* Degener, 30 Tex. App. 566, 17 S. W. Rep. 1111; Holman v. Mayor, etc., 34 Tex. 668; *Ex parte* Fisk, 113 U. S. 713, 5 Sup. Ct. Rep. 724, 28 L. Ed. 1117.

Jurisdiction of the person and subject-matter are not alone conclusive, but the authority of the court to render the particular judgment is the subject of inquiry; and if, upon review of the whole record, it appears that a judgment unwarranted by law was entered, the party thus placed in contempt will be released under the writ of *habeas corpus*. Same authorities. Among other jurisdictional defects is also found the following: The infliction of punishment in excess of that allowed by law (*Ex parte* Edwards, 11 Fla. 174; Haines v. Haines, 35 Mich. 138; People v. Liscomb, 60 N. Y. 559; *In re* Patterson, 99 N. Car. 407, 6 S. E. Rep. 643; *In re* Walker, 82 N. Car. 98; Com. v. Newton, 1 Grant, Cas. 453; *In re* Pierce, 44 Wis. 411); as also where the commitment is for an indefinite time. *Ex parte* Kearby 35 Tex. Cr. Rep. 531, 34 S. W. Rep. 635; Yoxley's Case, 1 Salk. 351; Rex v. James, 5 Barn. & Ald. 894, 7 E. C. L. 292; Cromartie v. Commissioners, 85 N. Car. 211; *In re* Hammel, 9 R. I. 248; *In re* Leach, 51 Vt. 630; People v. Pirfenbrink, 96 Ill. 68; State v. Myers, 44 Iowa, 580; Bickley v. Com., 2 J. J. Marsh. 575; *Ex parte* Alexander, 2 Am. L. Reg. (O. S.) 44; *In re* Watson, 3 Lans. 408; Com. v. Roberts, 4 Pa. L. J. 126.

If the judgment is not conclusive upon the question of the authority of the court to render it when the facts are not therein recited, then the recitation or partial recitation of the facts in such judgment, and upon which it is predicated, will not add anything more to its sanctity than if unrecited, and such judgment is as much the subject of attack as if such facts were entirely omitted. If the unrecited facts would not or do not authorize the particular judgment rendered, then the mere recitation of the same facts in the judgment will not make it valid, nor add strength or vitality to it. If the judgment is void, in either event it is the subject of inquiry in a *habeas corpus* proceeding, and it must be void to be so attacked. Authorities *supra*. In Parker's case, 35 Tex. Cr. Rep. 12, 29 S. W. Rep. 480, 790, this question was expressly decided. The judgment in that case recited as a fact that the court adjourned on May 14, 1892, and it was attacked on *habeas corpus* on the ground that this recitation was false, in that the court as a matter of fact did not adjourn on May 14th, but did adjourn after 12 o'clock at night of said day, which rendered the judgment void, because said court by law was necessarily terminated at midnight of said day. The contention was that the verdict was returned into court after 12 o'clock at night, and on this issue the case was tried by this court. If the verdict was returned after 12 o'clock at night, it was void, because, as stated above, the term of the court had necessarily terminated at the hour of midnight, and before the verdict was rendered. The recitation of fact in the judgment, if true, constituted the verdict a legal one, and the judgment valid. It was contended in that case, as it is in this, that the recitation of the fact in the judgment was conclusive, and not subject to attack in the *habeas corpus* proceeding. This court, however, held otherwise, and that it was permissible "to go behind the record, and probe into the very truth of the matter," etc. Judge Henderson, delivering the opinion of the court, uses this language: "Notwithstanding the recitals in the judgment in this case, we hold that it is competent, under the writ of *habeas corpus*, to go behind the record, and probe into the very truth of the matter, as to whether an act

purporting to have been done during the term was in fact done during the time recited by the record." See also *Ex parte* Juneman, 28 Tex. App. 488, 13 S. W. Rep. 783; White's Ann. Code Cr. Proc. § 98, subsecs. 6, 7; also sections 130 and 131,—for collated authorities, as well as the authorities cited *supra*. After hearing the facts in that case, the court sustained the judgment of the trial court. The Parker case, then, is authority for the further proposition that we will hear the facts on controverted issues of this character, and where there is a conflict in the evidence, which may or may not support the judgment, and there is sufficient evidence to support the judgment, that we will not disturb the ruling of the trial court. The writer did not participate in the decision in the Parker case, as will be seen by the report of that case. That case is decisive against the state's contention that the recitation of the facts in the judgment is conclusive, and cannot be attacked on *habeas corpus*, and that case but follows the unbroken line of decisions in this state since *Ex parte* Degener, *supra*. The same rule obtains as to orders, etc., of the court. See *Ex parte* Lake, 37 Tex. Cr. Rep. 656, 40 S. W. Rep. 727.

The order appointing relator one of the committee to examine the applicant for license to practice law was invalid, for reasons already stated, and was therefore non-enforceable. The fine of $25 sought to be imposed was equally invalid, for reasons already given. *Ex parte* Kearby, *supra*. The warrant by which he was arrested and brought into court was also void for want of authority for its issuance, there being no valid judgment or order for its support. Hence the refusal to act on the committee was not contempt. Relator had the right to protest against the illegal arrest, under the circumstances, and the mere fact that he may have exhibited anger or indignation at the unwarranted arrest did not constitute contempt. We wish to say that the power of the court is official,—judicial, and not personal,—and the relations of court and attorney are correlative. Courts may, will, and should enforce judicial power and functions when necessary; yet this must be done in a manner sanctioned by law, and in consonance with judicial dignity, and with due regard to the rights of parties to be affected. Attorneys are bound and will be held to obey legal orders of courts, yet the court should invoke its judicial authority under the law and in obedience thereto. The relationship of court and attorneys, bench and bar, are reciprocal, and each, in their proper sphere, is clothed with powers, rights, and privileges, which are to be recognized and respected by the other. These relations should be recognized and respected alike by the bench and bar, and, being carefully kept in view and followed as rules of action and conduct, will avoid friction. The judgment, being void, should be set aside, and the relator discharged; and it is so ordered.

NOTE.—*Jurisdiction of Courts to Punish for Contempt.*—Before reviewing the latest authorities on this important subject, a glance at the suggestions offered by Henderson, J., in his opinion dissenting from the decision in the principal case will not be without value and interest. He said in part:

"Inasmuch as it occurs to me that the court in its opinion has overlooked certain well recognized principles of the law which pertain to contempts in the presence of the court, and the power of this court on *habeas corpus* to examine into and review the action of the court adjudicating contempt, I deem it proper, at the outset, to state briefly the principles which govern such cases.

All courts of general jurisdiction have the inherent power incident to their very existence as courts to punish contempts committed in their presence. *Ex parte* Degener, 30 Tex. App. 572, 17 S. W. Rep. 1111; *Ex parte* Terry, 128 U. S. 306, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; Church, Hab. Corp. § 309; Rap. Contempts, § 1. In all cases of contempt in the presence of the court, the judge bases his action on his own personal knowledge; that is, the judicial eye witnessing the act. The judicial mind comprehends all the circumstances of aggravation, provocation, or mitigation, and his judgment does not require any extraneous support to render it effective. Crow v. State, 24 Tex. 12; *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; *In re* Wood, 82 Mich. 75, 45 N. W. Rep. 1113; *Ex parte* Wright, 65 Ind. 504; Middlebrook v. State, 43 Conn. 257; State v. Woodfin, 27 N. Car. 199. According to some of the authorities, and in consonance with the better practice, the court in finding a contempt should adjudicate the facts constituting such contempt. 4 Enc. Pl. & Prac. p. 798, and note 2 for authorities; Church, Hab. Corp. § 316 and note.

As a general proposition, before a court will exercise jurisdiction to discharge a party on *habeas corpus* from a contempt proceeding in another court, the judgment must be void for want of jurisdiction over the subject-matter or over the party. In some jurisdictions courts will inquire whether the court had the power to render the particular judgment it did,—that is, whether the matter was in fact a contempt,—and our own courts have adopted this doctrine. *Ex parte* Degener, 30 Tex. App. 572, 17 S. W. Rep. 1111. In the United States courts, and in most of our state courts, the judgment of a court finding a party guilty of contempt imports absolute verity, and cannot be questioned or contradicted in its findings on writ of *habeas corpus* by any other tribunal. *Ex parte* Terry, 128 U. S. 289, 9 Sup. Ct. Rep. 77, 32 L. Ed. 405; *Ex parte* Sternes, 77 Cal. 156, 19 Pac. Rep. 275; *Ex parte* Ah Men, 77 Cal. 198, 19 Pac. Rep. 380; *Ex parte* Acock, 84 Cal. 50, 23 Pac. Rep. 1029; Whittem v. State, 36 Ind. 196; Smith v. McLendon, 59 Ga. 523; *Ex parte* Bergman, 3 Wyo. 396, 26 Pac. Rep. 914; People v. Pirfenbrink, 96 Ill. 68; Church, Hab. Corp. §§ 316, 317, and notes; *Id.* §§ 336, 340; Rap. Contempts, 155.

Applying these well recognized rules of law to the question here involved, let us see how the relator stands as to the judgment of the court finding him guilty of contempt. I take it that no one will seriously contend that the district court did not have jurisdiction of the subject-matter at the time this contempt arose; that is, authority to appoint a committee of attorneys to examine the applicant, McCord, for license to practice law, and to require their attendance and service. It is contended, however, that

the jurisdiction did not properly attach, because no time was fixed in the order; but the parties were present, including the relator, and knew as to the time set, and this, at most, was a mere irregularity. It may be conceded that the court did not have authority to order an attachment for the relator on his failure to be present at the examination of the night of the 20th of March, and that he was illegally attached and brought before the court on the morning of the 21st of March; but when he was brought into the presence of that tribunal he was then before the court in regular session, and the court could require of him to discharge the duty, which had previously been imposed on him as an officer of the court, of examining the applicant for license. It occurs to me he could no more decline to join the committee and make the examination than could a witness in a case pending in court, who had been illegally attached on an order of the court, when brought before it refuse then to testify as a witness. *Ex parte* Ah Men, 77 Cal. 201, 19 Pac. Rep. 380, and authorities there cited. Suppose a witness in such case should not only refuse to testify because he had been brought into court under an illegal process, but should proceed to bandy words with the court, to tell the court that it must treat him as a gentleman, etc. This, according to the judgment of the court, is what the relator did. He peremptorily refused to go on with the examination. He told the court that he proposed to be treated as a gentleman, and not have an attachment served upon him to compel his attendance; that he treated the court like a gentleman, and that the court had to treat him as one. Not only so, he did this in an angry manner. If this was not a contempt of court, then what was it? I would not in this respect be understood as holding that, where a member of the bar or others may be illegally brought before the court, they have not the right at the proper time, in a respectful manner, to ask an explanation of the court as to the reasons which caused such action, and of uttering, if need be, a respectful protest; but I do not believe it accords with the dignity of the courts, and the respect in which they should be held, that their authority should be defied in threatening and menacing language and in angry tones. For aught that appears, if relator, in the first instance, had inquired of the court as to why he had been attached and had done this in a respectful manner, the court would have either heard him then, or have arranged to hear him subsequently. But it does not occur to me, from his own statement, that this was his conduct. On the contrary, in every essential respect it accords with the judgment of the court; and certainly it must be held, if the judgment of the court finding the contempt is to be nullified and destroyed by some other tribunal, it must be upon a clear case, showing that the matter could not under any circumstance constitute a contempt.

I believe in the rights of the American citizen; I believe in the dignity and manhood of the members of the legal profession; but I believe in the majesty of the law; and these rights, whether of life, liberty, or property, and whether assailed by the illegal acts of government or by the lawlessness or violence of individuals, will be best upheld and safeguarded by preserving the authority of the courts, for upon these [illegible]tence of the tribunals themselves."

The power to punish for contempt is the highest exercise of judicial power, it is not a mere incident to the exercise of judicial functions, and is necessarily inherent in all courts of law or equity. *In re* Mason, 43 Fed. Rep. 510; *In re* Millington, 24 Kan. 214; State v. Mathews, 37 N. H. 450; Holman v. State, 105 Ind. 513; Hughes v. People, 5 Colo. 436; Watson v. Williams, 36 Miss. 331; *In re* Rosenberg, 90 Wis. 581. At common law every court of competent jurisdiction was the absolute and exclusive judge of contempt committed against its own dignity and authority, and its decision could not be reviewed on appeal or on writ of *habeas corpus*. King v. Wooten, 54 Fed. Rep. 612; *Ex parte* Hardy, 68 Ala. 305; *Ex parte* Clancy, 90 Cal. 553; *In re* Debs, 158 N. S. 564; Bloom v. People, 23 Colo. 416; Shattuck v. State, 51 Miss. 50; *Ex parte* Goodwin, 67 Mo. 637; *In re* Rosenberg, 90 Wis. 581; Matter of Bissell, 40 Mich. 63. This is the general rule except where changed by statute. The following authorities show in what jurisdictions appeals are allowed. State v. Leftwhich, 41 Minn. 42; Hawes v. State, 46 Neb. 149; Welch v. Barber, 52 Conn. 147; People v. Diedrich, 141 Ill. 665; Matter of Daves, 81 N. Car. 72; Hundhausen v. Insurance Co., 5 Heisk. (Tenn.) 702; Worland v. State, 82 Ind. 49; People v. Dwyer, 90 N. Y. 402; State v. Knight, 3 S. Dak. 509; State v. Miller, 23 W. Va. 801; N. J. Pub. Laws 1884, p. 219; Va. Code, 1887, § 4053; Stat. Wis. § 115.

No judgment for contempt, however, is valid unless the court passing judgment had jurisdiction over the person and the subject matter and also jurisdiction to render that particular judgment. This is the modern rule, the earlier cases not inquiring into the question whether or not the court possessed jurisdiction to render the particular judgment. Thus in *Ex parte* Kearney, 7 Wheat. (U. S.) 40, the petitioner had been committed for contempt for refusing to answer a question which tended to incriminate him. Justice Story held that, irrespective of whether the refusal of the witness to answer the question constituted contempt of court, the only question which could be considered on application for a writ of *habeas corpus*, or on appeal, was the jurisdiction of the court over the party and the subject-matter, and that the jurisdiction to render the judgment in question could not be inquired into. In People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211, the court gave an excellent statement of the modern rule, holding that jurisdiction of the person and of the subject-matter are not alone conclusive, but if the jurisdiction of the court to render the particular judgment was unwarranted by law, the contemnor would be released on the hearing of a writ of *habeas corpus*. One cannot, therefore, be punished for contempt for disobeying a void order or one which the court had no power to make. Brown v. Moore, 61 Cal. 432; *Ex parte* Grace, 12 Iowa, 208; St. St. Louis, etc. R. R. v. Wear, 135 Mo. 230; Ruhl v. Ruhl, 24 W. Va. 279; Call v. Pike, 66 Me. 350; Lester v. People, 150 Ill. 408; *Ex Parte* Gardner, 22 Nev. 280. A glance at the decided cases will serve to make clear the exact limits of the rule just stated. Of course, an order of court which is merely erroneous must be obeyed. He who disobeys such a mandate commits a contempt for which he may be punished. But an order in excess of the powers of the court is without jurisdiction and void. Disobedience to it is not a contempt. Keenan v. People, 58 Ill. App. 241. It is contempt of court to refuse to obey any order which the court had jurisdiction to make, irrespective of whether such order is erroneous or improper; such error must be questioned by direct proceedings to review the order, not by disobedience.

Forrest v. Price, 52 N. J. Eq. 16; State v. Horner, 16 Mo. App. 191; *Ex parte* Spencer, 83 Cal. 460; *In re* Vanvaver, 88 Tenn. 334. Such order must be obeyed until overruled or set aside. Thus, where an order was irregular, one who failed to obey it, trusting entirely to the success of his attorney's efforts to have the order set aside, is guilty of contempt, though such efforts proved successful. Shults v. Andrews, 54 How. Pr. 378. But where the court is without jurisdiction to make the particular order its violation is not a contempt. McKinney v. Railroad, 140 Ind. 95 Thus, where a statute provided that in the absence of suitable provision by the county of a place to hold court, the judge of said court might direct the sheriff to provide the same and the expense so incurred should be a charge upon the county treasury, it was held that the judge after certifying the expenses incurred, has not, either inherently or under the statute, the power to order the treasurer to pay the same, and the latter is not guilty of contempt in refusing to obey such order. *Ex parte* Widber, 91 Cal. 367. Where a resident of a foreign state petitions for a writ of *habeas corpus* to obtain possession of his child, which is in the custody of his wife, its mother, in Pennsylvania, an order by the court requiring the wife and a relative to take the child to such foreign state "for the purpose of having a writ of *habeas corpus* served on them," if made, is void, and such persons are not guilty of contempt in disobeying it. Commonwealth v. Sager, 160 Pa. St. 399.

Since equity has no jurisdiction to enjoin the holding of an election, a writ issued for that purpose is void, so that a disregard thereof is not contempt. Darst v. People, 62 Ill. 306. Since an order requiring county officers to collect a tax, made in an action to which the officers were not parties, and in which they in no way appeared, was not binding on them, they were not guilty of contempt in refusing to obey it. McKinney v. Railroad, 140 Ind. 95. Where the court acts without jurisdiction in the appointment of a receiver for a partnership, a person cannot be adjudged guilty of contempt for refusal to obey an order requiring him to deliver to the receiver funds in his hands belonging to the partnership. State v. Winder, 14 Wash. 114. Where the board of supervisors have no jurisdiction to inquire into the authority of certain persons claiming to act as railroad commissioners, an attachment for the arrest of such persons for disobeying a summons to appear before a committee of the county board and produce certain documents was vacated. Faulkner v. Morey, 22 Hun (N. Y.), 379.

Under proceedings for contempt, therefore, of an order of court, the party in contempt may bring into question the jurisdiction of the court to make the order, though such order has not been appealed from and stands unreversed. The reason for this is that the contemnor of an order of court may show in defense that the court was without jurisdiction to make such order, and that hence there was, in legal effect, no order. The case of Forrest v. Price, 52 N. J. Eq. 16, makes this excellent statement of the rule: "It is no excuse in a proceeding for contempt that the orders contemned are erroneous in law. The method of correcting such error is by appeal, not by disobedience. Where a person is proceeded against for disobedience to an order or judgment, he cannot allege in defense that the court erred in that order or judgment. To be successful he must go further and make out that there was, in legal effect, no order, by showing that the court had no right to judge between the parties upon the subject."

JETSAM AND FLOTSAM.

WOMEN AS LAWYERS.

"Sir John Cockburn," says the *London Law Journal*, "moved the following resolution in Gray's Inn Hall on the 'Ladies' Night' of the Gray's Inn Debating Society: 'That the time has arrived when women should be admitted into the legal profession.' Mr. Rentoul, K. C., M. P., who opposed the resolution in an amusing speech, urged that a handsome lady barrister would exercise an unfair influence upon juries. He stated that a barrister was once engaged in a running down case, in which defeat was staring him in the face. His client and his witnesses, being members of the costermonger fraternity, had cut anything but an impressive figure in the witness-box. It suddenly occurred to him that his two handsome sisters had come to see him conduct the case. To their utter amazement, he called them as witnesses, but a few irrelevant questions to them without disclosing his relationship to them, asked them whether they saw the accident, and immediately they replied 'No' brought the examination to a close. 'These fascinating ladies,' said Mr. Rentoul, 'made a visible impression upon the jury; they gave tone to all the other witnesses, and my friend won his case.' Notwithstanding Mr. Rentoul's eloquence and wit, the resolution moved by Sir John Cockburn was carried. Mr. Merlin presided over the discussion, in which several ladies took part."

UNIVERSAL CONGRESS OF LAWYERS.

The largest congress of American lawyers ever assembled met at Denver, Colo., during the week of August 19. There was present at this meeting 311 members of the American Bar Association. The largest previous meeting was in 1896, when 296 were present. The association took in 227 new members at Denver. The total membership of the organization is now 1,802, representing thirty-nine states and territories. At St. Louis where the association will meet in 1903 during the progress of the Louisiana Purchase Centennial Exposition, the largest assembly of lawyers and jurists in the history of the world will take place. Mr. Charles Claflin Allen, the vice-president of the American Bar Association for Missouri, at the recent meeting at Denver, presented the following memorial, which was unanimously adopted:

"*To the American Bar Association:* In 1803 the United States purchased the Louisiana territory from France; in 1903 the Centennial of that purchase will be celebrated in the City of St. Louis, Missouri. After the purchase treaty was signed, Napoleon said to Marbois: 'This acquisition of territory strengthens forever the power of the United States.' His prophetic words have been realized. The Louisiana Purchase paved the way for the acquisition of Oregon, California and Texas; enabled the United States to span the continent from the Atlantic to the Pacific, and made her territory the meeting ground for the Occident and the Orient. The wilderness of 1803 has developed into fourteen states and territories, including the great state of Colorado, in which this meeting of the American Bar Association is held. The price paid by the United States for the territory was $15,000,000. Its taxable wealth to-day exceeds six thousand millions; and St. Louis, with the gen-

erous aid of congress, is prepared to devote a sum equal to the price of the purchase, solely to the celebration of its centennial in 1903. The resources of this great domain are wonderfully varied and marvelous in their extent. Perhaps few people, even within the limits of the purchase territory itself, realize that it produces one-half of the cotton raised in the United States, that a billion bushels of corn a year is not an extraordinary crop, that its wheat crop often amounts in value to $200,000,000; its hay crop to $150,000,000; that the cattle, horses and mules upon its ranges are valued at a thousand million dollars. This wonderful development in material resources has been accompanied by a corresponding development in the mental and spiritual life of its inhabitants. Universities, colleges, scientific and normal schools in many of the states are supported at the expense of the state. Private institutions of learning are numberless; and public schools, which must be in the future, even more than in the past, the conservators of the liberties of the people, can be seen from every hill top. Medical schools and law schools are to be found in many of the cities in the Louisiana Purchase, some of them ranking with the best professional schools in the country. The Centennial Exposition to be held in 1903 is in charge of the Louisiana Purchase Exposition Company, and the plans of the management contemplate a World's Fair greater and more wonderful than any ever held. It has an appropriation from congress of $5,000,000, the largest aid ever given by the United States to a like purpose, and it has the promise of full support by the government. It will not be like any of its predecessors in architecture, landscape, or design, or the arrangement of its exhibits. It will be a stupendous monument to the material growth and commercial and manufacturing development, not only of the Louisiana Purchase and the United States, but of the whole world. But it will be more than that. It is part of the plan to gather together the learned men of the world in the several departments of the arts and sciences, including the science of jurisprudence. There will be held in the City of St. Louis, Missouri, during the Centennial Exposition of the Louisiana Purchase, a universal congress of lawyers. This congress will be composed as follows: 1. Lawyers and jurists from every nation of the world. 2. Teachers of law, and persons learned in special branches of jurisprudence. 3. Persons learned in ancient law, including teachers of the history of law, and students of the laws of people and nations now extinct. The foregoing summary is an outline of the underlying idea of the plan. The character, constitution and management of the congress itself will be developed hereafter, and chiefly, it is hoped, by the American Bar Association. The committee on education of the Louisiana Purchase Exposition Company, upon whom falls the duty of preparing for this congress, adopt the definition of Justinian: 'Jurisprudence is the knowledge of things divine and human; the science of the right and the wrong.' The one great object is to make the congress of lawyers as universal in scope as that definition. Therefore, the Louisiana Purchase Exposition Company, acting through its committee on education, extends to the American Bar Association, as the great body of representative lawyers and jurists from all parts of the United States, an invitation to unite with the Louisiana Purchase Exposition Company in securing a universal congress of lawyers to meet at St. Louis, Missouri, during the exposition of 1903. To that end the American Bar Association is requested to appoint a committee of one hundred or more representative lawyers from different states and territories of the United States, and from the foreign countries, if desired, whose duty it shall be to plan, and, subject to the supervision of the Louisiana Purchase Exposition Company, arrange for the holding of such universal congress of lawyers."

BOOKS RECEIVED.

Hornbook Series: Admiralty Law, by Robert M. Hughes, M. A., of the Norfolk (Virginia) Bar. Sheep. Price, $3.75. West Publishing Co., St. Paul, Minn., 1901. Review will follow.

Hornbook Series: Equity Jurisprudence, by James W. Eaton, Esq., of the Albany Bar. Sheep. Price, $3.75. West Publishing Co., St. Paul, Minn., 1901. Review will follow.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT—Executors and Administrators—Final Account—Setting Aside Fraud.—A probate court has authority to set aside and annul an order allowing a guardian's final account obtained through fraud, and to re-examine the same, as if no such order had been made. The fact that consent by the ward to such allowance was procured through the aid of a written consent and acquittance obtained from the ward after his majority does not prevent the probate court from re-examining such order; and it may disregard such written consent and acquittance if the same were procured by fraud, and examine such account *de novo*.—LEVI V. LONDINI, Minn., 86 N. W. Rep. 333.

2. BENEFICIAL ASSOCIATIONS—Local Lodge—Suspension—Effect.—Where the supreme lodge of a beneficial association has designated the financial secretary of the local lodge as the proper person to receive payment of assessments, the failure of such secretary to transmit moneys received by him from an assured in payment of assessments, and the suspension of the local lodge for such non-payment, will not forfeit his benefit certificate, since the officer's negligence is not chargeable to the assured, but is that of an agent of the supreme lodge, notwithstanding a provision in the by-laws that the officers shall be agents of the members and not of the supreme lodge.—BRAGAW V. SUPREME LODGE KNIGHTS AND LADIES OF HONOR, N. Car., 38 S. E. Rep. 905.

3. BILLS AND NOTES—Acceptance—Consideration.—Where drafts given for the future delivery of coal were discounted by a bank, with the knowledge of the consideration therefor, it can enforce them, as against the acceptor, when discounted before maturity, and before a breach of the agreement to deliver.—TRADESMEN'S NAT. BANK v. CURTIS, N. Y., 60 N. E. Rep. 429.

4. BILLS AND NOTES—Usury—Tender.—Where the amount due on a usurious note cannot be definitely determined till an accounting, an actual tender of the amount admitted to be due by the debtor, in an action to restrain its collection, coupled with an offer in the bill to pay the amount legally due, constitutes a sufficient tender.—PURVIS v. WOODWARD, Miss., 29 South. Rep. 917.

5. BREACH—Damages—Contract.—Where defendant contracted to pay for advertising by allowance on the price of certain goods purchased, and, after an agreement for the purchase of such goods had been made at a cash price, refused to perform on learning that the purchaser intended to apply on the price the sum due for advertising, such agreed price may be recovered in money.—HAND v. GAS ENGINE & POWER CO., N. Y., 60 N. E. Rep. 425.

6. BUILDING CONTRACTS—Breach of Contract—Damages.—Where one claims damages from a contractor because of the failure to erect a store and office building within a given time, and the evidence supports such claim, the proper measure of damages is the rental value of the building for the time elapsing between the time fixed for its completion and the time when it was delivered and turned over.—CANNON v. HUNT, Ga., 38 S. E. Rep. 983.

7. BUILDING CONTRACT—Effect of Rescission.—Where an owner of a building repudiates the contract for its erection, and refuses to allow the contractor to go on with the work, it gives the contractor immediate right of action, and relieves him from obligation of producing certificate of engineer, which, under the terms of the contract, was necessary as a condition of payment.—SMITH v. WETMORE, N. Y., 60 N. E. Rep. 419.

8. BUILDING CONTRACT—Liability of Surety.—A provision in a surety bond to secure fulfillment of a contract to erect a church that "alterations increasing its cost to $300 are allowed" restricted permissible changes in the plans to that amount, and if such changes increased the cost to a larger sum, such changes would constitute a departure from the contract, and would release the surety company; following previous decision of this case in 83 N. W. Rep. 487.— NORWEGIAN EVANGELICAL LUTHERAN BETHLEHEM CONGREGATION v. UNITED STATES FIDELITY & GUARANTY CO., Minn., 86 N. W. Rep. 330.

9. CARRIERS—Loss of Freight—Agreed Valuation.—A railway company, in its capacity as a common carrier, may, as the basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and *bona fide* agreement as to the value of the property to be transported; and, in such case, the latter, when loss, damage, or destruction occurs, will be bound by the "agreed valuation." But a mere general limitation as to value, expressed in a bill of lading, and amounting to no more than an "arbitrary preadjustment of the measure of damages," will not, though the shipper assents in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value. Under section 2318 of the Civil Code, a carrier failing to comply with the requirements of the next preceding section, as to tracing "freight" which has been lost, damaged, or destroyed, and giving information with respect thereto, becomes liable for the negligence of a connecting carrier.—CENTRAL OF GEORGIA RY. CO. v. MURPHEY, Ga., 38 S. E. Rep. 970.

10. CARRIERS—Passengers—Destination—Failure to Stop.—Upon the trial of an action brought by a woman against a railroad company for damages alleged to have been sustained by her in consequence of having been carried beyond her destination and landed at night at or near a given town, where she, with no companion except her little child, was compelled to walk some distance in order to secure shelter and protection until the following morning, evidence that it was not the custom for ladies to walk about at that time of night without an escort in that town, or that it would be rather imprudent for a lady to walk a given distance in that place "in the dark" with no companion except a little child, was inadmissible; it not appearing that either the plaintiff or defendant had any knowledge of these facts.—DORSEY v. CENTRAL OF GEORGIA RY. CO., Ga., 38 S. E. Rep. 988.

11. CARRIERS — Trespassers — Wrongful Ejection.—Plaintiff was stealing a ride beneath a freight car, and while the train was moving about five miles an hour the brakeman threw a rock at him and cursed him and told him to get off, and the flagman said, "Give it to him," and plaintiff was injured by jumping off. Held, that the company was liable for the wrongful manner in which the ejection was accomplished.—COOK v. SOUTHERN RY. CO., N. Car., 38 S. E. Rep. 925.

12. CONFLICT OF LAWS — Usury.—Where money is loaned in Virginia on real estate security situated in North Carolina, the security being the basis of the loan, the rate of interest is governed by the law of North Carolina, and not by that of Virginia.—FAISON v. GRANDY, N. Car., 38 S. E. Rep., 897.

13. CONTRACT—Extension—Construction.—When the maturity of an obligation for the delivery of a specified quantity of a given commodity is extended by a contract in which it is expressly stipulated that the value of such commodity shall be that which it bore in a named market on a given day, and shall be determined in a designated manner, the holder of the obligation is bound to settle by the terms of such contract.—MCLELLAND v. SINGLETARY, Ga., 38 S. E. Rep. 942.

14. CONTRACT—Extension of Time—Construction.—Where, by the terms of a contract, payments are to be made on the 1st day of every month, but the party to whom they are due has notified the other that he does not intend to be exacting about it, and, in point of fact, during perhaps six consecutive months no payment is made on the 1st day of the month, the party owing the payments will not be held to have forfeited his rights under such contract by failure to pay upon the 1st day of the seventh month.—PRENTISS v. LYONS, La., 29 South. Rep. 994.

15. WRITTEN AND PRINTED WORDS—Construction.—The insertion of written words in a printed form, evidencing a contract, is entitled to more weight in its construction than the printed or typewritten provisions of the same.—SPRAGUE ELECTRIC CO. v. BOARD OF COM'RS OF HENNEPIN COUNTY, Minn., 86 N. W. Rep. 332.

16. CONTRIBUTORY NEGLIGENCE—Exercise of Reasonable Care.—In a personal injury action it is held, that the fact that plaintiff had no prior actual knowledge of the location of, or the danger causing her injury, is not conclusive that she was not guilty of contributory negligence. The rule in such cases is that if the person have no actual knowledge of the danger causing the injury, and could not by the exercise of reasonable care have discovered it, he cannot be said to be guilty of contributory negligence. But, if ignorant of the danger, and the exercise of reasonable care would have made it known, and there be a failure to exercise such care, he is chargeable with negligence, and to the same extent as though perfectly familiar with the location and danger.—RUSSELL v. MINNEAPOLIS ST. RY. CO., Minn., 86 N. W. Rep. 346.

17. CORPORATION—Forfeiture of Charter—Action.—A corporation is not to be deemed dissolved, or its charter forfeited, by reason of any misuser or nonuser of its franchise for the statutory period until the default and forfeiture have been judicially determined and

adjudged in a proper proceeding for such purpose.—BLOCH v. O'CONNOR MIN. & MFG. CO., Ala., 29 South. Rep. 925.

18. CRIMINAL EVIDENCE—Deceased Witness—Former Trial.—Secondary evidence of what the deceased or absent witness testified upon a former trial is only admissible upon a second trial between the same parties or their privies, and with relation to the same subject-matter; and, therefore, in a trial under an indictment for murder, testimony of what a deceased witness testified on the trial of a person other than the defendant, for the same homicide, is inadmissible.—SIMMONS v. STATE, Ala., 29 South. Rep. 929.

19. CRIMINAL EVIDENCE—Insanity as a Defense—Proof.—Though the United States Supreme Court hold that if, from all the evidence, the jury have a reasonable doubt of the prisoner's sanity, they must acquit, one will not be deprived of his life without due process of law, in violation of Const. U. S. Amend. 14, if he is executed under a conviction had at a trial in a state court, where, in accordance with the decision of the state supreme court, he is required to establish his insanity by a preponderance of the evidence.—COMMONWEALTH v. BARNER, Pa., 49 Atl. Rep. 60.

20. DEED—Loss—Copy — Admissibility.—Defendant asserted title under a sheriff's deed, and averred that the original was lost, and offered in evidence the registration books, which contained a copy, which was not under seal, but which recited that it was given under the grantor's hand and seal. The copy was in the exact form prescribed by the legislature for sheriffs' deeds, which was defective in not requiring a seal. Held, that the recital in the copy was not sufficient to warrant the presumption that the original was under seal, and the copy was properly excluded.—STRAIN v. FITZGERALD, N. Car., 38 S. E. Rep. 929.

21. DEFECTIVE STREETS—Contributory Negligence.—One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for his own safety, cannot hold another liable for damages resulting from a hurt thus occasioned, although the same may be in part attributable to the latter's negligence.—CITY OF COLUMBUS v. GRIGGS, Ga., 38 S. E. Rep. 953.

22. EMINENT DOMAIN—Reassessment by Jury—View.—On appeal from the award of appraisers fixing damages for the condemnation of a railroad right of way, neither party is entitled, as a matter of right, to have the jury view the premises, but such matter is entirely within the discretion of the court, and its action thereon is not cause for reversal, unless an abuse of discretion is shown.—CHICAGO, I. & E. RY. CO. v. WINSLOW, Ind., 60 N. E. Rep. 466.

23. EQUITY—Marshaling Assets — Judgments—Mortgages.—Where a judgment is a lien on several distinct tracts of land, part of which is subject to a subsequent mortgage, and the mortgagee tenders the amount of the judgment to the judgment debtor and requests an assignment for the purpose of preventing an execution sale of the mortgaged land, without first exhausting the other lands, and the judgment creditor refuses, an execution sale of the land at much less than its value, which is not necessary to protect the judgment, may be set aside in equity.—JAMES v. MARKHAM, N. Car., 38 S. E. Rep. 917.

24. EXECUTION—Exemptions — Evidence.—In an order to maintain a claim to chattels which is founded solely on the contention that they are the product or increment of duly-exempted personalty, it is incumbent upon the claimant to prove affirmatively that the subject-matter of the claim was obtained in exchange for exempted property or the proceeds thereof, or by labor exerted in connection with the use or consumption of such property, so that the newly-acquired personalty could with fairness and reason be said to take the place of that which had been set apart.—CULVER v. TAPPAN, Ga., 38 S. E. Rep. 944.

25. EXECUTORS AND ADMINISTRATORS — Liability for Rent.—The occupancy of a dwelling house by a woman after the death of her husband does not render his estate liable for the rent of such house.—CARTER v. TIPPINS, Ga., 38 S. E. Rep. 946.

26. EXECUTORS AND ADMINISTRATORS—Sale of Realty—Action to Set Aside.—In an action to set aside a sale of real estate by an administrator, on the ground of defects in the sale proceedings and of fraud in making the sale. Held, where an administrator is licensed to sell the land of his intestate by a probate court having jurisdiction of the settlement of the estate, and which appointed him, it is immaterial, in an action to set the sale aside, whether there was or was not a proper petition for the license.—SMITH v. BARR, Minn., 86 N. W. Rep. 342.

27. FIRE INSURANCE—Policy — Buildings Included.—Plaintiff owned a manufacturing plant, and the dry house was situated about 12 feet from the main building, and an engine house about 4 feet from the dry house, both of which were connected with the main building by a movable bridge. Held, that a fire insurance policy on the main building, and all additions thereto adjoining and communicating, covered the engine house and dry house.—MARSH v. NEW HAMPSHIRE FIRE INS. CO., N. H., 49 Atl. Rep. 88.

28. GUARDIAN AND WARD — Appointment—Review.—Where, in proceedings instituted upon the petition of the testamentary guardian for his appointment to that trust, the next of kin appeared and objected to such appointment, and also filed a petition setting forth that such testamentary guardian was not a suitable person to discharge the trust, a determination by the probate court in such a case that the guardian was competent and suitable is reviewable, and, upon proper appeal being taken, is entitled to be heard upon its merits in the district court.—IN RE LA PLANT, Minn., 86 N. W. Rep. 351.

29. HIGHWAYS—Road Supervisors—Failure to Repair—Personal Liability.—A road supervisor, liable, under Code, § 1557, for all damages resulting from a defect in a highway which is allowed to remain after a reasonable time for repairing the same after the receipt of a written notice thereof, is not personally liable for failure to repair a defect in a highway where notice thereof has not been given to him.—SELLS v. DERMODY, Iowa, 86 N. W. Rep. 325.

30. HOMICIDE—Insanity as a Defense — Evidence.—Insanity, to be a defense to a homicide, must be so great as entirely to destroy accused's perception of right and wrong, and amount to delusion controlling his will, and make the commission of the act a duty of overwhelming necessity.—COMMONWEALTH v. BARNER, Pa., 49 Atl. Rep. 60.

31. HUSBAND AND WIFE—Separate Estate — Debts of Husband—Trust Deed.—Where a married woman executes a trust deed to secure the payment of her husband's debts, it is not void, but voidable, and the defense of coverture is lost when it is not set up before sale under the trust deed.—ROGERS v. SHEWMAKER, Ind., 60 N. E. Rep. 462.

32. INJUNCTION—Mandatory.—Where, in a suit for injunction, the court found as conclusions of law, to which no exception was taken, that defendant railroad company had no right to any way obstruct plaintiff's driveway under defendant's track, a mandatory injunction was properly granted restraining defendant from obstructing such driveway.—LAKE ERIE & W. R. CO. v. ESSINGTON, Ind., 60 N. E. Rep. 457.

33. INTOXICATING LIQUORS — Unlawful Resale — Recovery of Price.—Where intoxicating liquors are sold in Massachusetts with intent by the buyer to resell them in another state, contrary to the laws of that state, the seller's mere knowledge of the buyer's intent will not prevent recovery of the purchase price.—GRAVES v. JOHNSON, Mass., 60 N. E. Rep. 383.

34. JUDGMENT—Collateral Attack.—If a judgment be absolutely void for defects patent on the face of the proceedings, the party oppposing its effects as to him is not driven to a direct action in the court which rendered it to secure the declaration of its nullity.—DECUIR v. DECUIR, La., 29 South. Rep. 982.

35. LICENSE—Unlicensed Persons—Recovery of Compensation.—A person who acts as agent of an insurance company, in soliciting, receiving, and forwarding to the company applications for life insurance, during a period when he does not have the license required by Rev. St. ch. 49, § 73, and amendments, cannot recover of the company the compensation for such services provided in the contract between him and the company.—BLACK v. SECURITY MUT. LIFE ASSN., Me., 49 Atl. Rep. 51.

36. LIFE INSURANCE — Action on Policy—Defenses.—In an action on a life insurance policy, the answer denied performance of its conditions by insured, and set up that the policy had been issued on the express condition that failure to pay the premiums should render it void, and alleged default therein. The answer failed to allege service of the notice required by Laws 1892, ch. 690, § 92, to pay the premium, as a condition precedent to the forfeiture of the policy. Held, that a notice and affidavit setting forth a substantial compliance with the statute were inadmissible in evidence, because of failure to plead the same.—FISCHER v. METROPOLITAN LIFE INS. CO., N. Y., 60 N. E. Rep. 431.

37. LIFE INSURANCE—Debtor and Creditor—Insurable Interest.—Insurance of his life by a debtor in favor of his creditor does not constitute a wagering contract, since the creditor has an insurable interest in the debtor's life.—BELKNAP v. JOHNSON, Iowa, 86 N. W. Rep. 207.

38. LIMITATION OF ACTIONS—New Promise—Letters.—Where letters acknowledged to have been written by the defendant are relied on to create a new promise to pay an existing open account, which on its face is barred by the statute of limitations, such letters must, to have such effect, with reasonable certainty of themselves, connect the debt with the promise, and sufficiently identify the debt. By their words they must acknowledge the particular debt as an existing liability in order to remove the bar of the statute.—SLACK v. SEXTON, Ga., 38 S. E. Rep. 946.

39. MORTGAGE—Assumption—Failure to Pay—Damages.—Defendant, having bought land of plaintiff and assumed a mortgage on it and other lands belonging to plaintiff, which other lands were subject to junior mortgages, is not liable to plaintiff for the full amount of the mortgage on his failure to pay it, and the sale under foreclosure thereof not only of plaintiff's lands, but of that bought by him from plaintiff.—FOLKEN v. HAHN, Iowa, 86 N. W. Rep. 258.

40. NEW TRIAL—Sufficiency—Newly-Discovered Evidence.—In a suit to set off plaintiff's interest in certain land and quiet his title thereto, which he claimed to have purchased with the proceeds of other land, evidence of the purchaser as to the price at which such other land was sold, which was less than plaintiff claimed, and insufficient to enable him to make the payments as claimed, was not cumulative, where there was no definite evidence on that point at the trial.—MALLY v. MALLY, Iowa, 86 N. W. Rep. 262.

41. NUISANCE—Abatement—Jurisdiction. — Save and except as to those things which are by the common or statute law declared to be nuisances *per se*, or which are in their very nature palpably and indisputably such, neither the municipal authorities of any city of this state, nor any department thereof which has been given the power to abate nuisances, has the legal right summarily to compel the abatement of a particular thing or act as a nuisance without reasonable notice to the person alleged to be maintaining or doing the same of the time and place for hearing and determining whether such thing or act does in law constitute a nuisance.—WESTERN & A. R. CO. v. CITY OF ATLANTA, Ga., 38 S. E. Rep. 296.

42. NUISANCE—Public—Successive Offenses.—Where, by an ordinance of the city of New Orleans, the doing of a certain act is prohibited as a public nuisance, and violation of the ordinance made punishable by fine or imprisonment, and each day's continuance of the nuisance is made a separate offense, a party convicted by a recorder upon separate and distinct and successive charges for violation for successive days of the ordinance, and separately sentenced upon each charge, cannot, by *certiorari*, have the sentences set aside as being an illegal division into different offenses of a single offense, where in none of the complaints is the party charged with more than one day's infraction of the ordinance.—STATE v. BAKER, La., 29 South. Rep. 940.

43. PLEADING AND PRACTICE — Trial — Findings of Fact—Correction—Nunc Pro Tunc Entry.—Where a case was tried and special findings of fact and conclusions of law filed at the May term of court, and the findings of fact were wholly insufficient to support the conclusions of law, amended findings of fact, filed in conformity with the motion of the successful party after the expiration of the next succeeding term of court, and after the period within which a motion for a new trial by the defeated party might have rightfully been made, were unavailing to support the judgment, though such findings were filed as of the date of the filing of the previous findings.—APPLE v. SMITH, Ind., 60 N. E. Rep. 456.

44. PRINCIPAL AND SURETY—Indemnity Bond—Construction.—Where a bond of a surety company, given for the faithful performance of the duties of a bank cashier, in its form and essence resembles an insurance contract, and differs materially from the ordinary forms, and is capable of two constructions, it will be construed most strongly against a forfeiture of the indemnity for which it was given.—BANK OF TARBORO v. FIDELITY & DEPOSIT CO. OF MARYLAND, N. Car., 38 S. E. Rep. 909.

45. QUO WARRANTO—Right of Action.—A judgment of ouster on an information in the nature of a *quo warranto* cannot be entered against one who, though once an unlawful incumbent of a public office, is not at the time the information is filed exercising the duties of the office, or claiming any title thereto.—HOLMES v. SIKES, Ga., 38 S. E. Rep. 978.

46. RAILROADS—Fencing—Injury to Cattle on Track.—Failure to keep a fence in such condition as will prevent cattle from going upon its right of way, does not subject a railroad company to the payment of damages for killing cattle thereon by the operation of its trains, unless such killing was negligently done.—GEORGIA SOUTHERN & F. RY. CO. v. WISENBAKER, Ga., 38 S. E. Rep. 956.

47. RAILROADS—Injuries to Persons on Track—Contributory Negligence.—Where trainmen in control of a railroad train back it down opposite a danger point in the street of a city without precautions of any kind to signify its approach, or to warn or protect citizens at the precise moment that a passenger train is moving in the other direction on a parallel track, and in so doing it strikes and kills a person occupying the open space between the two lines of track, the company is responsible for the injury, although the person injured may have contributed to some extent by imprudently backing in a moment of forgetfulness into the open space taken up by the overlapping of cars outside the rails.—LAMPKIN v. MCCORMICK, La., 29 South. Rep. 952.

48. SALE—Breach of Warranty—Evidence.—In an action by a purchaser to recover damages for a breach of warranty in the sale of a coal-burning engine with a straw-burning attachment, it appeared that the engine, as a coal burner, was a complete machine irrespective of the straw burner device. The measure of damages was the difference in value, for any purpose,

between the engine delivered and the combination sold, had it been as warranted.—BENSON v. PORT HURON ENGINE & THRESHER CO., Minn., 86 N. W. Rep. 327.

49. SALES—Insolvency—Fraudulent Intent. — Where an insolvent firm executed mortgages covering its entire stock to a bank, which mortgages were not recorded, and subsequently purchased goods of plaintiff, and before the delivery thereof agreed with the bank that it should collect all accounts of the firm, and apply the proceeds on the mortgages, the sellers were entitled to rescind the sale on the ground that the purchase was with the fraudulent purpose of not paying for the goods.—DEERE v. MORGAN, Iowa, 86 N. W. Rep. 271.

50. SURETY AND SURETYSHIP—Building Contracts.—The creditor has the right to sue the debtor and his surety, and if the surety is entitled to the benefit of discussion, he may, after judgment, have the property of the principal first seized and sold.—BRINK v. BARTLETT, La., 29 South. Rep. 958.

51. TAXATION—Remainders—Present Value.—Present value of remainders created in a trust fund not subject to be devested is determinable by aid of the table of annuities, and is not within the provision of the transfer tax act (Laws 1896, ch. 908, § 22), providing that an interest limited, conditioned, or dependent upon the happening of a contingency, by reason of which its market value cannot be ascertained at the time of the transfer, shall be taxable when the person beneficially interested shall come into actual enjoyment thereof.—IN RE DOWS' ESTATE, N. Y., 60 N. E. Rep. 439.

52. TAXATION—Collection — Injunction.—A tax collector who is attempting to collect an amount claimed to be due for taxes upon property which is not required by law to be returned for taxation in the county in which he holds his office, and which has been lawfully returned for taxation in another county, is proceeding without authority of law, and may be restrained by injunction at the instance of the person from whom the amount is sought to be collected.—PENICK v. HIGH SHOALS MFG. CO., Ga., 38 S. E. Rep. 974.

53. TELEPHONE AND TELEGRAPH COMPANIES—Injury to Employee—Assumption of Risk.—The fact that a lineman knew that a pole which he was about to use did not belong to the telephone company by which he was employed did not relieve the company from liability for defects in such pole, where the lineman was not chargeable with notice of an arrangement by which his employer did not have the right to inspect or repair the poles.—MCGUIRE v. BELL TEL. CO. OF BUFFALO, N. Y., 60 N. E. Rep. 423.

54. TRADE MARK—Validity — Descriptive Words.—A name, device, or symbol cannot be adopted as a trademark unless it expresses and identifies either the origin or ownership of the article to which it refers. Words merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trade-mark.—J. R. WATKINS MEDICAL CO. v. SANDS, Minn., 86 N. W. Rep. 340.

55. TRUST—Acceptance—Estoppel to Question.—A debtor transferred all his stock, fixtures, and accounts by bill of sale to one who agreed to pay debts due certain creditors mentioned, and to take possession of the property, and apply the proceeds. Held, that a valid trust was thereby created as to the personalty, good between the parties to it, though partly in writing and partly oral, and cannot be repudiated by the trustee as made with the intent to defraud creditors.—NEBBELHEIMER v. SMYTH, N. Y., 60 N. E. Rep. 448.

56. TRUSTS—Application of Income—Rights of Creditors.—Testatrix's husband contested, on the ground of incapacity, the validity of a codicil revoking provisions of the will creating a trust fund for his benefit. A compromise was entered into, with the approval of the surrogate, by which it was agreed that the amount as specified in the will should be invested, and the income paid to him for a period not to exceed five years, the other provisions of the will and the codicil to be unchanged, and the will to be admitted to probate. Held, that the income of the money invested by the trustees in pursuance of the compromise is to be considered as proceeds of the trust fund under the will, and not subject to judgments against him, where it is no more than necessary for his support.—EVERETT v. PEYTON, N. Y., 60 N. E. Rep. 423.

57. VENDOR'S LIEN — Foreclosure — Bill to Redeem—Averments.—In order to maintain a bill to enforce the statutory right of redemption, it must aver that the complainants therein were of a class of persons privileged by the statute (Code, § 3505) to exercise the right of redemption; and a bill which avers that the complainants were defendants in a chancery suit, wherein the sale from which the redemption is sought was decreed, for the satisfaction of a vendor's lien, but does not aver or show that the complainants in said suit were debtor defendants, is subject to demurrer.—HENDERSON v. HAMBRICK, Ala., 29 South. Rep. 923.

58. WATERS AND WATER COURSES — Riparian Owners—Nonuser.—All persons having lands on the margin of a flowing stream have, by nature, certain riparian rights in the water of that stream, whether they exercise those rights or not, and they may begin to use them when they choose. It matters not how much the owner of land upon a stream has actually used the water, or whether he has used it at all, his right to it remains unaffected for any period of time.—REEVES v. BACKUS BROOKS CO., Minn., 86 N. W. Rep. 887.

59. WILLS—Precatory Trusts.—Where a testatrix directed that the residue of her property should go "to my three sons and their wives, jointly, to be held by them as a joinfure," "to be equally divided between them, share and share alike, for the use, benefit, and support of said legatees and their children now in life, and such as may hereafter be borned to them, or each of them, with the request that they (the sons and their wives) hold the same for their (the grandchildren's) use and benefit," such provision, though couched in words of recommendation only, would be construed to impose a trust of the property on the parent in favor of the grandchildren.—ALLEN v. MCGEE, Ind., 60 N. E. Rep. 460.

60. WILLS—Precatory Trusts.—It is held by the court that the words in item 4 of the will, "I wish that the property, so as above given to said three wives of my three sons, be for the education of their children and the support of their families, respectively," created a trust upon the estate bequeathed to the wives to the extent of securing the education of the children of the three sons, thus referred to, of the testatrix, and the support of their families. Each wife may hold her share in trust separately from the others.—CLIFFORD v. STEWART, Me., 49 Atl. Rep. 52.

61. WILLS—Presumption of Revocation—Evidence.—There is no presumption of the continued existence of a will and codicil from the proof of their execution, so as to show their existence at the time of the death of testatrix, but the presumption that decedent had destroyed such will and codicil arises where, after death, they are not found after search.—IN RE KENNEDY'S WILL, N. Y., 60 N. E. Rep. 442.

62. WRONGFUL DEATH—Action—Distribution of Proceeds.—Construing sections 3828 and 3829 of the Civil Code together, and in the light of the decision of this court in Mott v. Railroad Co., 70 Ga. 680, 48 Am. Rep. 595, and of legislation since that decision, the children mentioned therein are the minor children of the deceased father. Consequently, when a widow recovers a judgment against a railroad company for the negligent homicide of her husband, his children, who were adults at the time of his death, are not entitled to share in the proceeds of the judgment.—COLEMAN v. HYER, Ga., 38 S. E. Rep. 962.